

August 3, 2011

**VIA EMAIL**

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***Re: inContact, Inc.'s Application for Review of WCB Decision – Corrected Letter***

Dear Ms. Griffin, Ms. Veach and Mr. Beckford:

On behalf of inContact, Inc. ("inContact"), included herewith please find a corrected version of the ex parte letter submitted earlier today. The letter has been amended to fix incorrect dates in the original filing.

Should you have any questions, kindly contact the undersigned.

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## MEMORANDUM

**TO:** Diane Holland Griffin  
Julie Veach  
Ernesto Beckford

**FROM:** Jonathan S. Marashlian  
Charles H. Helein  
Jacqueline R. Hankins

**DATE:** August 3, 2011

**RE:** inContact, Inc.'s Application for Review of WCB Decision

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Dear Ms. Griffin, Ms. Veach and Mr. Beckford:

On behalf of inContact, Inc. ("inContact"), the following memorandum supplements our firm's memoranda provided to the Office of General Counsel ("OGC") on April 4, 2011 and April 19, 2011. Specifically, during discussions with OGC staff on April 15, 2011, issues were raised regarding the Commission's interpretation of the term "decision" under Section 54.720.

On April 19, 2009, inContact submitted its Petition for Special Relief and Waiver ("Petition"), seeking FCC review of a Universal Service Administrative Company ("USAC") January 23, 2009 invoice assessing "true-up" contributions to the Universal Service Fund ("USF") based upon 2003 revenues.<sup>1</sup> On May 7, 2011, the Wireline Competition Bureau ("WCB" or "Bureau") issued an order dismissing inContact's Petition on the basis of a procedural infirmity.<sup>2</sup> Specifically, the Bureau determined that USAC's January 23, 2009 invoice constituted a USAC "decision" under Section 54.720(a) which triggered the 60-day time limitation for appeal.<sup>3</sup> Accordingly, because inContact had failed to appeal within 60 days of the issuance of the invoice, the Bureau found the Petition

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<sup>1</sup> *In the Matter of inContact, Inc. Form 499 Filer ID 818114 Petition for Special Relief and Waiver*, Petition for Special Relief and Waiver (filed Apr. 13, 2009). In an abundance of caution, inContact also appealed to USAC. USAC denied the appeal in a curt letter stating only that because the issue was concurrently pending before the Bureau, it would "defer[] to the FCC to decide the matter." Letter from USAC to Jonathan S. Marashlian, The *CommLaw* Group, dated July 31, 2009 at 2 (entitled "Administrator's Decision on Contributor Appeal").

<sup>2</sup> *In the Matter of Universal Service Contribution Methodology Request for Review by inContact, Inc. of a Decision by Universal Service Administrator*, Order, WC Docket No. 06-122, DA 10-779 at ¶ 1 (rel. May 7, 2010) ("inContact Order").

<sup>3</sup> inContact Order at ¶ 2.

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untimely.<sup>4</sup> On June 7, 2010, inContact filed an Application for Review of the Bureau's Order ("Application"), which remains pending before the Commission.<sup>5</sup>

In its pending Application, inContact disputes the Bureau's interpretation of the term "decision" in Section 54.720(a) to refer to a mere USAC invoice. In a recent decision on a service provider's request for review of a USAC ruling, the Bureau correctly distinguished between a mere invoice from USAC and an administrator "decision" under Section 54.720.

In the Order, a copy of which is attached hereto, Dorial Telecom, LLC ("Dorial") appealed USAC invoices to USAC on November 24, 2009.<sup>6</sup> USAC issued a letter ruling denying the appeal, in which it described its "pay and dispute" policy and refused to waive late payment penalties.<sup>7</sup> Dorial appealed USAC's May 18, 2010 ruling to the Commission on December 15, 2010.<sup>8</sup> Pursuant to its delegated authority, the WCB considered Dorial's request for review of USAC's ruling.<sup>9</sup>

The Bureau held that USAC's May 18, 2010 letter ruling constituted a USAC decision that triggered the 60-day time limit for appeals of administrator decisions under 47 C.F.R. § 54.720(a).<sup>10</sup> And, because Dorial had filed its request for review of USAC's May 18<sup>th</sup> decision on December 15, 2010, it far exceeded the 60-day time frame, and therefore its filing was procedurally defective.<sup>11</sup>

Based upon the Bureau's decision in the Dorial Order, it is clear that a mere USAC invoice does not constitute a "decision" under Section 54.720(a). Instead, USAC must issue a written ruling on an invoice appeal in order to start the 60-day clock under Section 54.720(a) for appeals of USAC decisions to the Commission. inContact respectfully requests that the Commission apply the precedent set in the Dorial Order to inContact's Application, and overturn the Bureau's Order finding inContact's Petition untimely. Upon application of this precedent, the Commission and its bureaus may no longer hide behind a procedural deficiency and must consider the underlying substance of inContact's Petition.

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<sup>4</sup> *Id.*

<sup>5</sup> *In the Matter of Form 499 Filer ID 818114 Petition for Special Relief and Waiver*, Application for Review of Order of Wireline Competition Bureau, 07-779, May 7, 2010, WC Docket No. 06-122 (filed June 7, 2010) ("Application for Review").

<sup>6</sup> *In the Matter of Universal Service Contribution Methodology, Dorial Telecom, LLC Request for Review of a Decision of the Universal Service Administrator*, Order, WC Docket No. 06-122 (rel. March 15, 2011) at ¶ 3 ("Dorial Order") (attached hereto as Exhibit A).

<sup>7</sup> Dorial Order at ¶ 3, n. 8 (citing Letter from USAC to Jose L. Solana, Counsel for Dorial Telecom, LLC, at 4-5).

<sup>8</sup> Request for Cancellation of Interest Assessed on Erroneously Reported Revenues on Form First and Second Fiscal Quarter Form 499-Qs for 2009 by Dorian Telecom, LLC, WC Docket No. 06-122 (filed Dec. 15, 2010).

<sup>9</sup> See Dorial Order at ¶ 1, n. 1; see also 47 C.F.R. § 54.722(a).

<sup>10</sup> Dorial Order at ¶ 3.

<sup>11</sup> *Id.* at ¶¶ 2-3.

inContact respectfully requests that the Office of General Counsel recommend to the Commission that it promptly apply this precedent, overturn the Bureau's Order per inContact's Application for Review, and address the pending Petition.

Should you have any questions, kindly contact the undersigned.

s/ Jonathan S. Marashlian

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## **EXHIBIT A: DORIAL ORDER**

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Dorial Telecom, LLC Request for Review of a	)	
Decision of the Universal Service Administrator	)	

**ORDER**

**Adopted: March 15, 2011**

**Released: March 15, 2011**

By the Deputy Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

1. In this order, we dismiss as procedurally defective Dorial Telecom, LLC (Dorial)'s request for review.<sup>1</sup> In its request, Dorial states that it incorrectly reported revenues on its quarterly Telecommunications Reporting Worksheets for the first and second quarters of 2009. The Universal Service Administrative Company (USAC) billed Dorial for universal service fund contributions based on the incorrectly reported amounts. Dorial refused to pay the invoices, and was subsequently assessed interest on the outstanding payments.<sup>2</sup> In the request for review, Dorial asks the Commission to cancel this interest.<sup>3</sup>

2. We find that Dorial's request for review is procedurally defective. The Commission's rules require requests for review of USAC decisions to contain a "full statement of relevant, material facts with supporting affidavits and documentation,"<sup>4</sup> and that a copy of such requests for review be served on USAC consistent with the requirements for service of documents in the Commission's rules.<sup>5</sup> Contributors have been on notice since at least the *Advantage Order* that we enforce these requirements and may deny appeals that are procedurally defective.<sup>6</sup> Dorial failed to support its factual assertions with an affidavit signed by an officer of the company or other knowledgeable individual, and failed to serve USAC with a copy of the request for review.

3. We also find that Dorial's request is untimely. The Commission's rules require requests for review of USAC decisions to be filed within 60 days of the issuance of the decision.<sup>7</sup> Dorial appealed the invoices at issue to USAC on November 24, 2009, and USAC addressed Dorial's appeal on May 18, 2010. In its ruling, USAC described its "pay-and-dispute" policy in detail, stated that it will not waive

<sup>1</sup> Request for Cancellation of Interest Assessed on Erroneously Reported Revenues on Form First and Second Fiscal Quarter Form 499-Qs for 2009 by Dorial Telecom, LLC, WC Docket No. 06-122 (filed Dec. 15, 2010) (Dorial Request for Review). The Commission has delegated authority to the Wireline Competition Bureau (Bureau) to consider requests for review of decisions by USAC. 47 C.F.R. § 54.722(a).

<sup>2</sup> Dorial Request for Review at 5-7, 9.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> 47 C.F.R. § 54.721(b)(2).

<sup>5</sup> 47 C.F.R. § 54.721(c).

<sup>6</sup> *Federal-State Joint Board on Universal Service; Request for Review by Advantage Telecommunications Corp. of Action by Universal Service Administrator*, CC Docket No. 96-45, Order, 22 FCC Rcd 5088, 5089, para. 5 (Wireline Comp. Bur. 2007) ("Contributors are on notice that we may deny future appeals for procedural defects.").

<sup>7</sup> 47 C.F.R. § 54.720(a).

late payment penalties unless the payment dispute is determined to be the result of a USAC error, and noted that Dorial had accumulated late payment penalties because it had not paid its full contribution obligation.<sup>8</sup> Thus, contrary to Dorial's claim that the application of interest to the outstanding balances "was not addressed" in the May 2010 decision,<sup>9</sup> USAC ruled on the interest issue on May 18, 2010 and any appeal should have been filed within 60 days of that date, or by July 2010. Dorial did not file the instant request for review until December 2010, well after the 60-day deadline.

4. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 4(i) and 254(d) of the Communications Act, 47 U.S.C. §§ 4(i), 254(d), and the authority delegated by sections 0.91, 0.291, and 54.722 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722, the request for review filed by Dorial Telecom, LLC on December 15, 2010 IS DISMISSED WITH PREJUDICE.

5. IT IS FURTHER ORDERED that this order SHALL BE transmitted to the Universal Service Administrative Company.

6. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this order SHALL BE effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Vickie S. Robinson  
Deputy Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau

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<sup>8</sup> See Letter from USAC to Jose L. Solana, Counsel for Dorial Telecom, LLC, at 4-5 (dated Nov. 24, 2009).

<sup>9</sup> Dorial Request for Review at 2 n. 1.